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No. 06-

IN THE

Supreme Court of the United States

ARTURO BEGUIRISTAIN and JORGE CASTELLO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. INTRODUCTION

This petition emanates from the trial of ten police officers. Two are Petitioners Beguiristain and Castello. Each was a member of the City of Miami Police Department. All were charged with "*lying*" to *city* and/or *local internal affairs officers during state and departmental investigations* of state authorized shootings. The "lie" involved whether guns were found at certain shooting scenes. Despite the alleged "lie," each and every 1995-1997 *shooting* at issue, was cleared by state authorities.[1] All were "justified" *regardless of whether guns were retrieved* from felons, at each shooting scene. Nonetheless, a federal investigation *later* ensued. In 2001, Petitioners were charged, then convicted of violating 18 U.S.C. § 371 and 18 U.S.C. § 1512(b)(3). The Eleventh Circuit affirmed. It did so, despite the fact that: (1) there was *no* joint state-federal investigation at the time statements were made; (2) *none* of Petitioners' statements were made to federal officers;[2] (3) no statements regarding *any* police

[1] All *shootings* were cleared. All statements related thereto were not. Some "false" statements gave rise to state criminal charges. No one was convicted. Beguiristain, a highly decorated police officer and recipient of the "Medal of Valor," *was never charged by state authorities*. Castello, honored with a presidential award as a "Top Cop" of the nation, was one of the most highly decorated officers in the United States. His statement concerned the *only* shooting in which he was *ever* involved. His state case ended in a mistrial.

[2] Statements by Beguiristain and Castello were given during state investigations only. Beguiristain gave statements on three of the shootings to local law enforcement officers, investigating possible state crime. He gave another statement to an internal affairs investigator who *only* investigated possible departmental infractions; and: (1) did not (Cont'd)

shooting *had ever been transferred to federal authorities prior to this case*; (4) neither Petitioner had any expectation that such statements would be transferred; and, (5) none of the statements at issue, involved a federal offense.

B. QUESTIONS

1. Whether *Arthur Andersen LLP v. United States* applies to § 1512(b)*(3)* cases; or, is limited to § 1512(b)(*2*) convictions *only* (as decided by the Eleventh Circuit in the case at bar) despite the fact that: (a) this Court *accepted certiorari* based upon conflict in two 18 U.S.C. § 1512(b)(*3*) opinions; (b) this Court repeatedly refers to the *entire* 18 U.S.C. §1512(b) section, not a subsection thereof; and, (c) footnote 8 of the *Arthur Andersen* opinion specifically refers to *all 3 subsections* including § 1512(b)(3).

2. Whether § 1512(b)(3) can be construed to cover circumstances in which facts at issue essentially: (a) federalize state criminal conduct; (b) vitiate both the "specific intent" and "federal nexus" requirements under obstruction of justice statutes; (c) criminalize conduct not contained in the statute (i.e. information regarding *possible federal offense* interpreted as encompassing information regarding a *possible investigation of a possible federal offense*); (d) violate fundamental due process; (e) federalize conduct in a manner which offends fundamental precepts of federalism; and, (f) renders § 1512(b)(3) unconstitutional as applied.

(Cont'd)
investigate possible state crime; (2) did not *transfer* statements to *state investigators*; and, (3) did not preserve statements for subsequent review. Petitioner Castello gave *one* statement to state officers *only* after the one shooting in which he was involved, was cleared as "justified," by every state authority.

PARTIES TO THE PROCEEDING

Arturo Beguiristain

Jorge Castello

Jorge Garcia

Israel Gonzalez

Jose Quintero

Oscar Ronda

Jesus Aguero

United States of America

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 455 F.3d 1273 (11th Cir. 2006). (App. A).

JURISDICTION

The Eleventh Circuit affirmed Petitioners' convictions on July 13, 2006. Thereafter, on October 16, 2006, the Eleventh Circuit entered an Order which also denied Petitioners' timely Petition for Rehearing En Banc. (App. B). Jurisdiction of this Court is therefore invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions involved in this petition include: U.S. Const., Art. III, U.S. Const. Amend. V and U.S. Const. Amend. X; 18 U.S.C. § 1512(b)(3); 18 U.S.C. § 371; and, 18 U.S.C. § 242. All are included in the Appendix. (App. C).

STATEMENT

For well over a decade, this Court has grappled with both the "federal nexus" and corresponding "corrupt persuasion" or ("specific intent") elements, essential to sustain a conviction for *federal* obstruction of justice. Circuits have been in conflict. So are opinions they rendered. Each indicated a state of confusion as to exactly what evidence is required to establish "corrupt persuasion," "specific intent" and "federal nexus." All are essential elements upon which a federal obstruction of justice charge is predicated. As a result of obvious confusion regarding such important issues, this Court confronted the conflict in *United States v. Aguilar*, 515 U.S. 593 (1995).

In *Aguilar*, this Court affirmatively articulated the "corrupt persuasion" and "federal nexus" required to sustain a conviction under 18 U.S.C. § 1503. In so doing, however, the *Aguilar* Court relied upon an interpretation of the legislative history of 18 U.S.C. § *1512*. Interpretation of 18 U.S.C. § 1512 indicated that uttering false statements *alone* did not constitute a violation under 18 U.S.C. § 1503. Something more was required. The "something more" articulated in *Aguilar* was: (1) "an active attempt to persuade a witness to tell a false story"; and, (2) a federal "nexus." The "federal nexus" component was critical to cast criminal conduct into the federal forum. It required that action taken by the accused be done with an intent to influence a federal judicial or grand jury proceeding. (*Id.* at 599). Intent to influence an ancillary proceeding was insufficient. So was commission of an act which *lacked* a relationship in time, causation or logic with the judicial proceedings. (*Id.*).

Unfortunately, the opinion announced in *Aguilar* did not resolve considerable disagreement which confounded various courts among the federal circuits. Thus, despite definite dictates of *Aguilar*, confusion on essential elements – i.e. "corrupt persuasion," "specific intent," and "federal nexus," continues to plague various Circuit Courts. It does so, despite this Court's most recent opinion in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

In fact, as a result of the Eleventh Circuit opinion in the case at bar, tension between the opinions of this Court and several federal circuits has reached a critical stage. All such tensions would be eased if this Court accepted certiorari jurisdiction in this particular case. So would residual conflict. This Court: (1) could specifically address whether § 1512(b)(3) is governed by the dictates of *Arthur Andersen*; and, (2) affirmatively articulate that which is required to establish "corrupt persuasion," "specific intent," and a "federal nexus."

Failure to do so at this juncture, allows the continuation of untenable conditions, in which certain federal circuits: (1) vitiate the "specific intent" and "federal nexus" requirements in obstruction of justice cases; (2) violate due process; (3) offend fundamental precepts of federalism; and, (4) improperly expand the terms of the obstruction of justice statute to criminalize conduct clearly *not* contained within the language of the statute.

A. CIRCUIT COURTS HAVE HISTORICALLY STRUGGLED WITH BOTH: (1) THE MEANING OF "CORRUPT PERSUASION"; OR, "SPECIFIC INTENT"; AND, (2) THE FEDERAL NEXUS REQUIREMENTS UNDER OBSTRUCTION OF JUSTICE STATUTES.

Prior to *Aguilar*, Circuit Court opinions reflected both confusion and conflict over: (1) the meaning of "corrupt persuasion"; or, "specific intent"; and, (2) the requisite "federal nexus." Chief among them, was the Third Circuit Court of Appeals. It *first* addressed the issue of intent and federal nexus required under 18 U.S.C. § 1512(a)(1)(c) prior to *Aguilar*. It did so, in *United States v. Bell*, 113 F.3d 1345 (3d Cir. 1997). In *Bell*, the Third Circuit held that the government must prove, "the conduct which the defendant *believed* would be discussed in the( ) communication( ) *constitutes a federal offense*, so long as the government also presents 'additional appropriate evidence.'" (*Id.* at 1349) (emphasis added). Although "additional appropriate evidence" was not defined; it was determined to also be necessary to establish "specific intent." According to *Bell*, "specific intent" was evident *only* if the "defendant intend(ed) to prevent a communication to a law enforcement officer, . . . (and) that *such officer* (*was*), *in fact, a federal officer*." (*Id.* at 1350) (emphasis added).

In so ruling, however, the Third Circuit expressed explicit concern that "if we demanded 'only that the government prove

that the underlying offense is federal and that the defendant intended to prevent the witness from communicating with *law enforcement in general . . . we would essentially vitiate an important facet of the intent requirement of the statute.*'" (*Id.* at 1348) (emphasis added). Unfortunately, subsequent decisions were not as sensitive to the inherent dangers articulated in *Bell*.

Hence, in *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999) the Third Circuit ostensibly "lessened the government's burden of proof" in federal obstruction of justice cases. It did so, because the court did not require any "additional appropriate evidence" to prove the defendant believed the person he attempted to corruptly persuade might communicate with federal authorities. Expansive language articulated in *Applewhaite*, however, was somewhat undermined by the overwhelming evidence upon which the opinion was based. Such evidence showed that under *Applewhaite*: (1) the Government was still *required to prove that the "hindered" transmission of information, was in fact a transmission to a federal officer; and,* (2) the Government was still *required to prove that the transfer involved information about a federal offense*. At least one of the factors was missing, in *United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998).

In *Veal*, the Eleventh Circuit found *Aguilar* to be absolutely inapplicable to § 1512(b)(3). It did so, despite the fact that this Court (in *Aguilar*) looked to 18 U.S.C. § 1512 in interpreting essential elements under § 1503. Regardless, the Eleventh Circuit found that § 1512(b)(3) "does not connect the federal interest to an ongoing or imminent judicial proceeding or the defendant's knowledge of one." (*Id.* at 1251). So, according to the Eleventh Circuit, the *only* "federal interest derives from the *character* of the affected activity." (*Id.*)[3]

[3] "Seeking to foster communication of truthful, nonmisleading information to federal authorities regarding a possible federal crime is the important federal interest that § 1512(b)(3) effectuates." (*Id.* at 1251).

To that end, the Eleventh Circuit held "(a)ll that was required for . . . violation of § 1512(b)(3) was the *possibility* or *likelihood* that (the defendants') false and misleading information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigators." (*Id.* at 1251-52) (emphasis added). Thus under *Veal*, a defendant: (1) *need not* make a false statement to an officer who happens to be federal; (2) *need not believe* that information which he intends to hinder, will be transferred to federal officials; and, (3) *need not know* that such information involves a federal offense. As a result, the Eleventh Circuit seriously undermined both the "specific intent" and "federal nexus" requirements essential to sustain a conviction under § 1512(b)(3).

Consequently, when the Fifth Circuit addressed the same issues, it declined to follow *Veal*. *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999). Instead, the *Causey* Court focused upon what the evidence actually indicated about the defendant's intent. (*Id.* at 422). Evaluation of such evidence in *Causey*, illustrated that the defendants' "specific intent" was not to obstruct a federal proceeding. Neither was it intended to hinder the transmission of information to federal officers, about a federal offense. Rather, the defendant's intent was to short-circuit a pending IAD investigation. (*Id.* at 422-23). As a result, the defendant could not be convicted of *federal* obstruction of justice. Neither could the federal conviction be affirmed even if there *was* an ancillary federal impact which eventually occurred. Thus, according to the Fifth Circuit in *Causey*, the killing of a witness who complained to IAD but *may* have also been an informant in a joint state federal task force, did *not* constitute obstruction of justice under 18 U.S.C. § 1512.

Additional conflict was evidenced in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998) and *United States v. Farrell*,

126 F.3d 484 (3d Cir. 1997). In *Farrell*, the Third Circuit held that *more culpability* is required to establish a statutory violation under § 1512(b)(3). Once again, the Eleventh Circuit, showed no such judicial restraint. Instead, the Eleventh Circuit refused to "impose( ) a requirement for an additional level of culpability on § 1512(b) in the absence of any indication that Congress so intended and in the face of persuasive evidence that it did not." (*United States v. Shotts,* 145 F.3d at 1301). In so doing, the Eleventh Circuit again overlooked essential elements and expanded the reach of 18 U.S.C. § 1512(b)(3).

Thereafter, because of clear conflict in at least two circuits involving § 1512(b)(*3*),[4] this Court again addressed the issue. It did so in *Arthur Andersen*, 544 U.S. 696, 702 (2005) citing *United States v. Shotts,* 145 F.3d 1289 (11th Cir. 1998) and *United States v. Farrell*, 126 F.3d 484 (3rd Cir. 1997), in granting certiorari review.

B. CONFUSION AND CONFLICT CONTINUES DESPITE DEFINITIVE DICTATES OF THIS COURT'S OPINION IN *ARTHUR ANDERSEN.*

In *Arthur Andersen*: (1) this Court accepted certiorari jurisdiction based upon conflict in two 1512(b)(*3*) cases; (2) this Court continuously referred to § 1512(b) in its entirety (not a subsection thereof); (3) this Court specifically referenced 1512(b)(*3*) in footnote 8 of the Opinion; and, (4) this Court repeatedly referenced *Aguilar*, which in turn had relied upon interpretations under § 1512. Nonetheless, the Eleventh Circuit inexplicably opined (in the case at bar), that the *Arthur Andersen* opinion absolutely does not apply to cases involving § 1512(b)(*3*). It did so, because *Arthur Andersen* involves "judicial proceedings," while § 1512(b)(*3*) does not. Instead,

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[4] "Because of a split of authority regarding the meaning of § 1512(*b*), we granted certiorari." (*Id.* at 702).

18 U.S.C. § 1512(b)(3) involves the *transmittal of information to federal officers*.

According to the Eleventh Circuit, since § 1512(b)(3) involves an impact on *transmission* of information to federal officers (by hindrance) while *Arthur Andersen* involves impact on a federal judicial proceeding, the dictates detailed in *Arthur Andersen*, simply do not apply. So, in the Eleventh Circuit, to obstruct justice in the federal forum, "judicial proceedings" must be "foreseen." But, when the "obstruction" is predicated upon the *transmittal* of information to *federal* officers, there is *no* corresponding requirement that the "transmittal" be "foreseen." Nor, apparently, must there be evidence of a possible federal offense. Instead, there need only be evidence of a *possible investigation* of a possible federal offense.

In so ruling, *the Eleventh Circuit federalized conduct which is strictly local in nature*. More specifically, it held (in this case) that making a false statement to a *state law enforcement* officer (or internal affairs investigator) during a *state investigation* of a *state-authorized shooting*, about a possible state crime (lying to state officer; state perjury; or, state obstruction of justice) constitutes a federal offense – despite the fact: (1) that statements were not made to a federal officer; (2) that statements were not made as a result of a joint state-federal investigation; (3) that transmittal of such statements (about a state-authorized shooting) to federal officers had *never before occurred*; (4) that defendants had no expectation that such statements would be transferred to federal officers; and, (5) that such information *admittedly* did not involve the federal offense of civil rights violations, articulated in the bill of particulars. *United States v. Ronda,* 455 F.3d 1273, 1288, 1290-91 (11th Cir. 2006) (App. 28a, 32a-35a).

As a result of the opinion (in this case), the tension between the Eleventh Circuit and the opinions of this Court, has expanded to become, far more than a "split." Rather, it has *now* become a

Continental Divide. *Ronda*, 445 F.3d at 1290-91 (App. 32a-35a). Moreover, the resultant "divide" is not limited to that evidenced in the Eleventh Circuit. The First Circuit has also indicated doubt about whether the *Arthur Andersen* opinion applies to § 1512(b)(*3*). *United States v. Byrne*, 435 F.3d 16 (1st Cir. 2006). In so doing, the First Circuit indicated that

> (i)n the end, we need not resolve the exact contours of any nexus requirement in subsection (b)(3). . . . If the defendant suggests that *Arthur Andersen* requires a heightened showing of a nexus in a § 1512(b)(3) prosecution, . . . we express our doubts but defer any final judgment for a future case that requires resolution of that issue.

435 F.3d at 25.

Neither Circuit Court which addressed the issue, has held that *Arthur Andersen* applies to § 1512(b)(3) cases. One expressed clear doubts. The other specifically held that the *Arthur Andersen* Opinion does not apply to cases involving § 1512(b)(*3*). Regardless, *both* create clear tension between the opinion of this Court in *Arthur Andersen*, and that of these two circuits. Such opinions also illustrate that conflict and confusion which has historically plagued the federal forum in obstruction of justice cases, clearly continues still. In fact, it has been rendered more acute since this Court's opinion in the *Arthur Andersen* case. As a result, *this* case should be considered on certiorari review: (1) to determine whether the dictates of *Arthur Andersen* apply to cases involving § 1512(b)(*3*); and, (2) to again explicate the requisite "specific intent" and "federal nexus" required to constitute obstruction of justice in a *federal* forum.

REASONS FOR GRANTING THE PETITION

I. IN *RONDA*, THE ELEVENTH CIRCUIT CONSTRUED 18 U.S.C. § 1512(b)(3) IN A MANNER WHICH: (A) IGNORES THE HOLDING IN *ARTHUR ANDERSEN*; (B) VITIATES THE SPECIFIC INTENT REQUIREMENT UNDER § 1512(b)(3); AND, (C) ESSENTIALLY ELIMINATES THE FEDERAL NEXUS REQUIREMENT.

In *Arthur Andersen*, this Court focused on what it means to "'knowingly . . . corruptly persuad[e]' another person 'with intent to . . . cause' that person to 'withhold documents from . . . an 'official proceeding.'" 544 U.S. at 703. In so doing, however, this Court: (1) accepted certiorari based upon conflict in two cases which involved § 1512(b)(3); (2) referenced § 1512(b) in its entirety, not a subsection thereof; and, (3) specifically referred to *all* subsections including § 1512(b)(3).

> Section 1512(b)(2) addresses testimony, as well as documents. Section 1512(b)(1) also addresses testimony. Section 1512(b)(3) addresses 'persuade(rs)' who intend to prevent 'the communication to a law enforcement officer or judge of the United States of information' relating to a federal crime.

(*Id.* at 704 n.8). Despite such definitive dictates, the Eleventh Circuit determined (in the case at bar) that in reviewing § 1512(b)(3) convictions, the directives announced in *Arthur Andersen*, simply do not apply.

Instead, in *Ronda*, the Eleventh Circuit predicated proof of the required "specific intent to interfere with transmittal of information to a federal officer", *not* upon whether the transmittal was "foreseen" (as required in *Arthur Andersen*) but,

upon the *likelihood* that false or misleading information would, in fact, be transferred to federal authorities.[5] It did so, despite the fact that there was no such "likelihood" evidenced in the case. There was no written policy or departmental order which said that "questionable shootings" (or any other police shooting) would be referred to federal authorities. And, *no police shooting had been referred to federal authorities prior to those involved in this case*;[6]

Under such circumstances, transmittal of information to federal authorities about a police shooting was *not* "likely",[7] because it had *never once* occurred.[8] Moreover, when "it" did

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[5] *United States v. Veal*, 153 F.3d at 1248 ("This federal nexus argument implicates the specific intent or mens rea requirements for violating §1512(b)(3)").

[6] *But see Brosseau v. Haugen*, 543 U.S. 194 (2004)

> Because the focus is on whether the officer had *fair notice that [his] conduct was unlawful*, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

(*Id.* at 198) (emphasis added). There was *no* "fair notice" here.

[7] *Evanston Insurance Co. v. Stonewall Surplus Lines Insurance Co.*, 111 F.3d 852, 860 (11th Cir. 1997) ("likely" means "probable"); *United States v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1985) ("likely" "should be read in its ordinary sense, as referring to something that is more likely to happen than not"); *Id.* at 1239 n.2 (Gibson, J., concurring in part and dissenting in part); *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 22 (1st Cir. 2001) (defining "likelihood" as probable).

[8] In *Ronda*, the Eleventh Circuit claimed that police incidents were *routinely* referred to federal authorities. In so doing, they referenced

(Cont'd)

occur for the first time in this case: (1) the federal investigation did not begin until after all shootings were cleared by every state officer, agency and court; (2) the Government *agreed* that state statutes complied with constitutional mandates; (3) there was *no* evidence of a federal offense; and, (4) *no statements were made by Petitioners Beguiristain or Castello to any federal officer. United States v. Bell*, 113 F.3d 1345 (3d Cir. 1997).

> We expressed concern that *if we demanded 'only that the government prove* that the underlying offense is federal and that the defendant *intended to prevent the witness from communicating with law enforcement officers in general . . . we would essentially vitiate an important facet of the intent requirement* of the statute.'
>
> * * *
>
> Accordingly, we believe that the law of this circuit . . . is that the *government must prove that at least one of the law-enforcement officer communications which the defendant sought to prevent would have been with a federal officer.*

(*Id.* at 1348-1349). There was no such evidence here.

Neither Petitioner Beguiristain nor Petitioner Castello communicated with a federal officer. Nor did they have notice that statements in a cleared police shooting would *ever* be

(Cont'd)

police *beatings*. Police beatings *are* routinely referred to federal authorities because, unlike police *shootings*, there is not a state statute which specifically enumerates the precise parameters of conduct which is both reasonable and "justified" under Florida Statutes and the United States Constitution. There *is* such a statute regarding police shootings. And, prior to this case, no city or state police shooting had ever been referred to federal authorities.

transferred to federal authorities. As a result, the Eleventh Circuit's application of *Veal* and exclusion of *Arthur Andersen* to the facts of this case, "vitiated an important facet of the intent requirement of the obstruction statute," and essentially eliminated the federal nexus.[9] It also eliminated the requirement that transferred information involve the *federal offense articulated in the government's bill of particulars*.

The "possible federal offense" articulated in the bill of particulars was "possible civil rights" violations. Assessment of a "possible civil rights violation" begins with understanding Petitioners' lawful authority in the use of deadly force. 18 U.S.C. § 242; *United States v. Causey*, 185 F.3d at 415 ("In determining whether sufficient evidence supported the 'under color of law' element of the convictions, we are called upon to determine first, whether [appellant] misused or abused his official power.") (citing *West v. Atkins*, 487 U.S. 42, 50 (1988)).

In this case, "official power" is outlined in Florida Statute § 776.05 and Florida Statute § 776.06. Each *admittedly* complies with constitutional mandates. All provide Petitioners with absolute authority to use deadly force: (1) to shoot an *un*armed fleeing felon who is a danger to either the officer or the community; (2) to shoot to protect the safety of himself or other officers; and, (3) to shoot to protect the safety of another. Therefore, in this case, each and every shooting illustrated that Petitioners "acted within the bounds of lawful authority." All were completely "justified" as a matter of law.

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[9] *United States v. Aguilar*, 515 U.S. 593, 601 (1995) (federal nexus cannot be based upon federal impact which is speculative); *United States v. Causey*, 185 F.3d 407, 422-423 (5th Cir. 1999) (reversed because felonious conduct intended to "short-circuit the IAD" not a federal investigation).

Not one government witness *ever* claimed to the contrary. All agreed that each shooting was "justified," regardless of whether guns were retrieved from felons, at each shooting scene. As a result, *not one* witness, and not one iota of evidence introduced by the Government ever indicated evidence of a "possible" civil rights violation. Thus, the opinion rendered by the Eleventh Circuit in this case: (1) vitiated the "specific intent" requirement; (2) vitiated the "federal nexus" requirement; and, (3) eliminated the essential element regarding "possible federal offense."

II. THE ELEVENTH CIRCUIT OPINION IN *RONDA* ALSO VIOLATED FUNDAMENTAL PRINCIPLES OF FEDERALISM.

With increasing consistency, this Court has announced its admonition against expansion of federal jurisdiction. *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (federal courts should have great trepidation in treading into jurisdictional expansion, "in the absence of a clear statement by Congress"); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (Federal Gun Free School Zone Act unconstitutional because federal interest minimal).

To that end, "Congress . . . will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Cleveland v. United States*, 531 U.S. at 25 (citations omitted); *Printz v. United States*, 521 U.S. 898, 899 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text."); *United States v. Odom*, 252 F.3d 1289, 1292, 1294-95 (11th Cir. 2001) (reversed because: (1) federal nexus under 18 U.S.C § 844(i) was too passive, too minimal, and too indirect, to substantially affect interstate commerce; and, (2) held statute "should be construed . . . to require a distinction

between what is truly national and what is truly local"); *United States v. Morrison*, 529 U.S. 598 (2000)

> Congress 'has no general right to punish murder committed within any of the States,' and . . . it is 'clear . . . that Congress cannot punish felonies generally.' Indeed we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

(*Id.* at 618) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) (Marshall, C.J.)); *Jones v. United States*, 529 U.S. 848, 858 (2000) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the 'federal-state balance' in the prosecution of crimes.").

Unfortunately, the Eleventh Circuit overlooked this key distinction.[10] Instead, it construed § 1512(b)(3) to *federally* criminalize statements made by *city* police officers to *internal affairs* and *state investigators* even though: (1) there was no federal investigation; (2) there had never been a federal investigation of a police shooting; (3) the police shooting was cleared by all state officers, agents and courts *prior* to the subsequent initiation of a federal investigation; (4) any statement by Petitioner Beguiristain or Petitioner Castello was made to a state official, with *no knowledge* and *no notice* that such statements would be transferred to federal authorities; and, (5) none of the statements at issue involved a *federal* offense.

As result, the Eleventh Circuit interpreted § 1512(b)(3) in a manner that expands the bounds of federal jurisdiction despite

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[10] *Kinsella v. United States*, 361 U.S. 234 (1960); *Printz v. United States*, 521 U.S. at 919 ("powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States"); U.S. Const. Amend. X.

the fact there is: (1) *insufficient* proof of a *possible federal offense*; (2) *insufficient* proof regarding the *requisite federal nexus*; and, (3) insufficient evidence of the requisite intent.[11] In so doing, federalism principles were violated. Jurisdictional demarcation was destroyed. State-federal balance in the prosecution of crimes was unconstitutionally altered. And now, every crime, no matter how limited and local in nature, will trigger an application of federal law despite the fact that: (1) crime and local police matters are particularly preserved by the states; (2) federal courts are not courts of general jurisdiction;[12] and, (3) their jurisdiction is sharply circumscribed with all doubts resolved *against* the exercise of jurisdiction.[13]

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[11] The lack of "specific intent" is rendered more acute because of evidence knowingly withheld from Petitioners, *despite* a District Court Order that required *all* statements of Government witnesses (including prosecutor's notes thereon) be provided. Unfortunately, they were not. In the trial of these Petitioners the Government withheld notes on an interview of a key witness which stated, "*mindset not on feds but on own department.*"

[12] *Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001) ("Fundamental to our law is the understanding that '[f]ederal courts are not courts of general jurisdiction.'"); *Marine Equipment Management v. United States*, 4 F.3d 643, 646 (8th Cir. 1993) ("Federal courts are not courts of general jurisdiction and have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto."); *Rogers v. Frito-Lay Inc.*, 611 F.2d 1074, 1078 (5th Cir. 1980) ("Federal courts are not common law courts of general jurisdiction. Limited by the express language of the Constitution, and the functional role it allots to the judiciary, we can recognize the cause of action only if it has been created by statute.").

[13] *Raygor v. Regents*, 534 U.S. 533, 544 (2002) (court should avoid construction of federal statute in manner which raises doubts as to constitutionality); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000) ("[D]oubts regarding whether removal jurisdiction is proper

(Cont'd)

III. THE ELEVENTH CIRCUIT OPINION IN *RONDA* VIOLATED PETITIONERS' DUE PROCESS RIGHTS BY CONSTRUING § 1512(b)(3) IN A MANNER WHICH REQUIRES PROOF OF *ONLY* A POSSIBLE *INVESTIGATION* OF A POSSIBLE FEDERAL OFFENSE.

Section 1512(b)(3) defines obstruction of justice as engaging "in misleading conduct toward another person with intent to . . . hinder, delay, or prevent the communication . . . of *information relating to the commission or possible commission of a Federal offense* . . . ." It does *not* say the violation includes hindrance, delay or prevention of communication to federal officers relating to a *possible investigation* of a possible federal offense. And, it cannot be construed as if it actually did. To do so, criminalizes acts *not* proscribed by the statute. *United States v. Kloess*, 251 F.3d 941, 944 (11th Cir. 2001) ("'In construing a statute we must begin, and often should end as well, with the language of the statute itself.'") citing *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997) ("The Supreme Court has instructed us time and again that, 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'"); (*Id.* at 944-45) (citations omitted).

To that end, in *United States v. Handakas*, the Second Circuit stated, "'courts may not assume the place of the Congress by writing or rewriting criminal laws pursuant to which citizens will be prosecuted. This is solely the prerogative of Congress.'" 286 F.3d 92, 110 (2d Cir. 2002), *overruled on other grounds by*

(Cont'd)
should be resolved against federal jurisdiction."); *Greenlees v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197, 200 (5th Cir. 1994) ("[S]tatutes conferring jurisdiction are to be strictly construed, and doubts are to be resolved against federal jurisdiction."); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984) (accord).

United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003); *Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939) (judicial "specification of details of the offense intended to be charged [will] not serve to validate [a vague statute]"). Simply put, the proscribed conduct must be extant in the statute and cannot be supplied by the prosecution, particularly on an ad hoc basis.

Hence, federal courts can neither expand the terms of a statute nor explain an apparent void to overcome inherent interstices in a federal criminal statute. Incredibly (and unmistakably), that is precisely what occurred. The Eleventh Circuit, improperly expanded the reach of § 1512(b)(3) to include *possible investigations* of possible federal offenses. *Ronda,* 455 F.3d at 1290 (§ 1512(b)(3) includes a *possible* "*investigation* into the possible commission of a federal offense.") (emphasis added) (App. 33a-34a).

In so ruling, the Eleventh Circuit improperly expanded the reach of § 1512(b)(3) to criminalize conduct *not* contained in the language of the statute. The Eleventh Circuit also improperly interpreted "possible" to include that which clearly is not. And, it interpreted "likely" to include that which *had never once* occurred. As a result, the Eleventh Circuit eviscerated the specific intent requirement contained in § 1512(b)(3). It essentially eliminated the federal nexus requirement. It ignored the "requisite possible civil rights violation" alleged in the bill of particulars. And, most significantly, it improperly expanded the language and reach of a federal criminal statute. *Arthur Andersen*, 544 U.S. 696 (2005).[14]

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of

[14] Due process violations were rendered more acute because of the District Court's refusal to give a jury instruction on Florida Statutes which specifically state that the use of deadly force in each of the subject shootings was both justified and lawful. (App. D).

> deference to the prerogatives of Congress, *Dowling v. United States*, 473 U.S. 207, 105 S.Ct. 3127, 87 L.Ed.2d. 152 (1985), and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed,' *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931)." *United States v. Aguilar*, 515 U.S. 593, 600, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995).

(*Id.* at 703).

Regardless, the Eleventh Circuit ignored fundamental precepts articulated in *Arthur Andersen*. To do so was error. And, the error rendered § 1512(b)(3) unconstitutional as applied. *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (If "[s]tatutory language [is] of such a standardless sweep [that it] allows policemen, prosecutors, and juries to pursue their personal predilections" then it is unconstitutionally vague.); *United States v. Reese*, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.").

CONCLUSION

A Petition for Writ of Certiorari should be granted in this case because: (1) this case creates tangible tension between this Court's opinion in *Arthur Andersen* and the case at bar; (2) Circuit Courts are confused as to whether the dictates of *Arthur Andersen* apply to cases involving § 1512(b)(3); (3) Circuit Courts continue to be in conflict about the "specific intent" required to establish a violation of § 1512(b)(3); and, (4) Circuit Courts continue to be confused and conflicted about the "federal nexus" requirement under § 1512(b)(3).

If such confusion is allowed to continue unchecked, the apparent reach of federal jurisdiction (as illustrated in the case at bar) can be extended in a manner which: (1) violates fundamental principles of federalism; (2) vitiates essential elements of § 1512(b)(3); (3) improperly expands the language of a federal criminal statute; (4) violates the due process rights of defendants snared in the wide net, now cast by an improper expansion of the statutory language in § 1512(b)(3); and, (5) renders 18 U.S.C. § 1512(b)(3) unconstitutional as applied.

Respectfully submitted,

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